Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6290

GLEN D. DUPRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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The petitioner, Glen D. Dupris, by and through counsel, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit which reversed the dismissal of the case by the United States District Court for the District of South Dakota.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 612 F.2d 319 and is set forth in Appendix A, infra. The opinion of the District Court is reported at 453 F. Supp. 1171 and is set forth in Appendix B, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on November 27, 1979. By order dated December 3, 1979, the time for filing a petition for rehearing was extended until December 21, 1979, and a timely petition for rehearing was filed on December 20, 1979. The petition for rehearing was dismissed with prejudice on January 18, 1980, and the petitioner's subsequent motion to vacate the dismissal order was denied on February 11, 1980.[1/] By order of this Court dated February 21, 1980, the time for filing a petition for writ of certiorari was extended until March 20, 1980, without prejudice to the Court's consideration of whether the application had been timely filed.[2/] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether the Act of May 29, 1908, 35 Stat. 460, had the effect of disestablishing that portion of the Cheyenne River Indian Reservation which was opened to non-Indian settlement under the Act.

1/ The circumstances surrounding this sequence of events are set forth in the petitioner's Application for Extension of Time within Which to File a Petition for Certiorari, No. A-701, filed February 19, 1980. On March 17, 1980, following an evidentiary hearing, the District Court ruled, inter alia, that the document which resulted in the dismissal of the petition for rehearing was the product of undue interference by outside parties with the rights of the accused, and did not represent a voluntary waiver by the petitioner of his right to raise the jurisdictional defenses presented herein. The dismissal of the petition for rehearing therefore appears to have been erroneous.

2/ It is the position of the petitioner that the time for filing this petition was suspended by the timely filing of a petition for rehearing in the Court of Appeals, and that the time for filing began to run no earlier than January 18, 1980, the date when the petition for rehearing was dismissed. See, e.g., United States v. Healy, 376 U.S. 75, 78 (1964); Leishman v. Associated Electric Co., 318 U.S. 203, 205 (1943); Gypsy Oil Co. v. Escoe, 275 U.S. 498 (1927); Morse v. United States, 270 U.S. 151, 153-54 (1926). Therefore, under Rule 34(20) of this Court, the application for extension of time, which set forth the extraordinary circumstances involved, was timely because it was filed within the initial period established for the filing of the petition for certiorari. See Rules 22(2) and 34(1).

STATUTE INVOLVED

The statute primarily involved is the Act of May 29, 1908, 35 Stat. 460, as amended by the Act of February 17, 1910, 36 Stat. 196. Both Acts are set forth in Appendix C, infra.

STATEMENT OF THE CASE

This case is a criminal prosecution arising from the alleged commission of burglary and larceny by the petitioner, a juvenile enrolled member of the Cheyenne River Sioux Tribe, in the city of Eagle Butte, South Dakota. The retail establishment in which the alleged crimes occurred is located on fee patented land in that portion of the historic Cheyenne River Indian Reservation, as established by the Act of March 2, 1889, 25 Stat. 888, which was opened to non-Indian settlement pursuant to the Act of May 29, 1908, 35 Stat. 460, and the Presidential Proclamation of August 19, 1909.[3/] On June 1, 1977, the United States filed an information charging the petitioner with two violations of the Major Crimes Act, 18 U.S.C. § 1153. The information stated that the alleged crimes took place within the boundaries of the Cheyenne River Reservation, and were therefore subject to federal jurisdiction under the Major Crimes Act.

The petitioner moved to dismiss the prosecution for lack of jurisdiction on the grounds that the 1908 Act disestablished the affected portion of the reservation and the situs of the alleged crime was therefore not "Indian Country" as defined by 18 U.S.C. § 1151. Following an evidentiary hearing and the submission of briefs, the District Court in June 1978 granted the motion to dismiss and issued a comprehensive opinion which concluded that the effect of the 1908 Act was to disestablish the Cheyenne River Reservation. United States v. A Juvenile, 453 F. Supp. 1171 (D.S.D. 1978).

3/ The 1908 Act opened portions of both the Cheyenne River Indian Reservation in South Dakota and the Standing Rock Indian Reservation in North Dakota and South Dakota.

The District Court decision was appealed by the United States to the Eighth Circuit Court of Appeals which, in November 1979, reversed the District Court over a vigorous and scholarly dissent by Judge McMillian. United States v. Dupris, 612 F.2d 319 (8th Cir. 1979). The petitioner's petition for rehearing was dismissed with prejudice, and the petitioner here seeks review of the decision of the Court of Appeals.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The decision of the Court of Appeals directly conflicts with the most recent decisions of this Court governing the resolution of the question presented in the instant case. The decision below not only disregards the holdings of these cases, but fails to use the methodical analysis mandated therein.

During the past five years this Court has twice addressed the question of the disestablishment of Indian reservations, or portions thereof, by acts of Congress. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975). These cases set forth in detail the proper analytical approach to be used in the resolution of such questions, which consists of an examination of the following factors: the face of the act, the legislative history and surrounding circumstances, and the subsequent jurisdictional history. See Rosebud, supra at 607-08; DeCoteau, supra at 442, 444. While the opinion of the Court of Appeals noted some of these factors, it does not thoroughly examine the evidence which was presented to the District Court. Furthermore, instead of weighing the cumulative effect of all the evidence, the Court of Appeals discussed each point raised by the dissent separately, and after finding no single argument by itself dispositive, erroneously concluded that no showing of congressional intent to disestablish had been made.

In so doing, the Court of Appeals failed to use the analysis mandated by this Court, and instead reaffirmed its earlier decision in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973), which had held that the Act in question did not have the effect of disestablishment. The Condon decision predated both DeCoteau and Rosebud, and therefore must be reexamined in light of this Court's decision in the latter cases. See Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 173 n.11 (1977).

It is well settled that the intent of Congress controls the determination of questions of disestablishment of Indian reservations or portions thereof. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977); DeCoteau v. District County Court, 420 U.S. 425, 442, 444 (1975). By disregarding clear expressions congressional intent, the decision of the court below is in direct conflict with the mandates of this Court. Moreover, the decision below ignores the specific rulings of this Court in cases involving similar statutes and similar circumstances.

Contrary to the court's conclusion below, 612 F.2d at 321, Slip Op. at 5, a congressional intent to terminate the reservation status of the lands affected by the 1908 Cheyenne River Act is discernible from the face of the Act. For example, it is important to note that Section 2 of the 1908 Cheyenne River Act expressly referred to the unopened lands as "the reservation thus diminished." (emphasis added). To refer to a reservation as "diminished" can only mean that its boundaries have been reduced and the outlying portion disestablished. See United States ex rel. Cook v. Parkinson, 525 F.2d 120, 122 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). See also Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 611, 613 (1977).

Furthermore, Section 9 of the Act gave timber rights to Indians residing in certain townships "as long as the lands remain part of the public domain." (emphasis added). The restoration of lands to the public domain is synonymous with disestablishment. See Rosebud, supra at 589 n.5; DeCoteau v. District County Court, 420 U.S. 425, 426-27, 446, 448-49 (1975); Seymour v. Superintendent, 368 U.S. 351, 355 (1962).

Moreover, Section 7 of the 1908 Act reserves from settlement Sections 16 and 36 of each township in the opened area and grants them to the States in which they are located "for the use of the common schools." The significance of this provision was thoroughly explored by the District Court. United States v. A Juvenile, 453 F. Supp. 1171, 1194. As explained in the District Court's opinion, and by this Court in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 599-601 (1977), under the Enabling Act by which South Dakota and North Dakota were admitted into the Union, § 10, 25 Stat. 676 (1889), Sections 16 and 36 of each township were granted to the States as school lands. However, lands within military or Indian reservations were excluded from this grant "until the reservation shall have been extinguished and such lands be restored to ... the public domain." As this Court explained in Rosebud, the reasonable conclusion to be drawn from such a provision is that Congress contemplated a disestablishment of the reservation and made the school grants provided for in § 10 of the Enabling Act. This conclusion is directly supported by the legislative history relied on by the District Court. 453 F. Supp. at 1192. Although the Court of Appeals minimized the importance of this argument, 612 F.2d at 322, Slip Op. at 8, the significance placed on the equivalent school lands section discussed in Rosebud indicates that the argument carries substantial weight.

Finally, § 8 of the 1908 Act, as amended in 1910, forbade the introduction of intoxicating beverages into the area opened by the Act. Act of February 17, 1910, 36 Stat. 196. As noted by both the District Court, 453 F. Supp. at 1198, and Judge McMillian in his dissent from the Eighth Circuit decision, 612 F.2d at 334, Slip Op. at 36, the provision is wholly superfluous if the opened lands were not disestablished, for the introduction of intoxicants was already outlawed on reservations by the Act of July 23, 1892, 27 Stat. 260. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 613-15 (1977). The court below dismissed this argument by accepting the argument of the United States that because the Indians allegedly requested that liquor be banned throughout the reservation, the amended § 8 is merely an enactment of that request. This argument, however, ignores the language of § 8 which specifically refers to the land opened by the 1908 Act, and fails to note this Court's interpretation of an identical provision in Rosebud, supra at 613-15.

Any ambiguity which may be thought to exist in the meaning of the provisions of the 1908 Cheyenne River Act can be resolved by reference to the legislative history and the circumstances surrounding the passage of the Act. A close examination of these factors serves only to bolster the conclusion that the underlying purpose of the Act was disestablishment.

For example, the Senate Report refers to the area left unopened by the Act as "the reservations as diminished." S. Rep. No. 439, 60th Cong., 1st Sess. at 4 (1908). In addition, the account of Inspector McLaughlin's consultations with the Indians and the correspondence of the Department of the Interior, attached to the Senate Report as a supplemental report, is replete with references to cession and relinquishment

of lands, to new boundaries, and to diminished reservations. See S. Rep. No. 439, Part 2, 60th Cong., 1st Sess., passim (1908). As the District Court aptly noted, the fact that these materials were expressly made a part of the Report shows that "the Senate Committee carried forth into the Senate itself the records that contain the operating assumption upon which the correspondence and discussions were based -- namely, that passage of the ... bill would alter the boundaries of the Cheyenne River Reservation ..." United States v. A Juvenile, 453 F. Supp. 1171, 1185 (D.S.D. 1978).

More persuasive, perhaps, is the fact that the 1908 Act here in dispute was only one segment of a unified scheme of legislation enacting the then prevailing federal Indian policy in the Dakotas. As Judge McMillian points out in his dissent below, this statute is one of several nearly identical bills passed between 1904 and 1910 which opened a number of reservations to settlement. 612 F.2d at 326-28, Slip Op. at 16-22. Two of these were the 1907 and 1910 Rosebud Acts which were held to have the effect of disestablishment by this Court in Rosebud, and another was the 1910 Pine Ridge Act held to have the same effect by the Eighth Circuit in United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). See Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; Act of May 27, 1910, 36 Stat. 440; Act of May 30, 1910, 36 Stat. 448. The striking similarity of language between the relevant portions of these acts and the 1908 Cheyenne River Act cannot be overemphasized.[4/] Another statute, the 1904 Rosebud Act,

4/ The text of the 1907 and 1910 Rosebud Acts is appended hereto in Appendix D for comparison.

used somewhat different language but, as this Court has stated, was passed with precisely the same intent as the later Rosebud Acts. 430 U.S. at 609, 614-15. These surplus land bills were nearly all introduced by the same legislators, and the negotiations were all conducted by the same federal official, Inspector McLaughlin. See 612 F.2d at 326, Slip Op. at 17 (McMillian, J., dissenting).

Finally, the court below found the subsequent jurisdictional history of the area involved in this case to be inconclusive. It should be noted that the jurisdictional history in Rosebud was itself not entirely clear. 430 U.S. at 603. However, the evidence does indicate that the State exercised jurisdiction over the area for several decades without interruption prior to the decision in Condon in 1972. United States v. A Juvenile, 453 F. Supp. 1171, 1199-1200 (D.S.D. 1978). In any event, as the District Court held, the arguments that were advanced by the United States are not persuasive and do not compel a finding that the reservation was not diminished.

The evidence before the courts below leave no room for doubt as to the effect of the 1908 Cheyenne River Act. Like the other strikingly similar statutes enacted during the same decade, the Act opened a portion of the affected reservation to settlement and removed that portion from reservation status. The Court of Appeals unnecessarily discounted this evidence and did not adequately explain its reversal of the comprehensive and scholarly treatment of the available material by the District Court. More importantly, the Court of Appeals failed to explain its divergence from the recent decisions of this Court. A proper examination of the relevant evidence leads to the unmistakable conclusion that the Act here in issue cannot be distinguished from those considered by this Court

in Rosebud, and that, as in Rosebud, the intent of Congress was to disestablish that portion of the original reservation opened by the Act. Therefore, the decision of the court below is in direct conflict with this Court's decision in Rosebud, and, if allowed to stand, will seriously undermine the principles stated by this Court.

II. THE JURISDICTIONAL ISSUES PRESENTED BY THIS CASE ARE OF BROAD IMPORTANCE.

The resolution of the issues presented in this case will extend beyond the exercise of federal jurisdiction over the petitioner and will significantly affect the exercise of jurisdiction by state, county, federal, and tribal governments in the area involved, which includes large portions of several counties of South Dakota and North Dakota. The importance of this case to the affected States and Counties is reflected in their active participation in the litigation below.[5/] In addition, the State of South Dakota and counsel for the affected Counties, both of whom participated in the Rosebud and DeCoteau litigation before this Court, have advised counsel for petitioner that they will file amicus briefs in support of this petition.

5/ The Counties of Dewey, Ziebach, and Corson, South Dakota, and the County of Sioux, North Dakota, submitted extensive briefs in both the District Court and the Court of Appeals and joined in the petition for rehearing filed in the Court of Appeals. The States of South Dakota, North Dakota, and Minnesota joined in the petitioner's suggestions that the hearing and rehearing in the Court of Appeals be held en banc.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. The matter should be scheduled for argument on the merits, or, in the alternative, be remanded to the Court of Appeals for further consideration in light of DeCoteau v. District County Court, 420 U.S. 425 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). See Appawora v. Brough, 431 U.S. 901 (1977).

Respectfully submitted,

/s/

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AFFIDAVIT OF SERVICE

I hereby certify that a copy of the foregoing was served by first-class United States Mail, postage prepaid, this 20th day of March, 1980, upon the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530.

/s/

William W. Shakely

Subscribed and sworn to before me this 20th day of March, 1980.

/s/

Notary Public